

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

AMANDA JANE WOLFE and
PETER E. BOERSCHINGER,
individually and on behalf of others
similarly situated,

Petitioners,

v.

ROBERT WILKIE,
in his capacity as
Secretary of Veterans Affairs,

Respondent.

Vet. App. No. 18-6091

**PETITIONER’S OPPOSED MOTION FOR APPOINTMENT OF A SPECIAL
MASTER TO ENFORCE THE COURT’S JUDGMENT**

This Court’s April 6, 2020 Order enforcing its September 9, 2019 Order required VA to, *inter alia*, (i) send corrective notice letters to all class members; (ii) begin readjudicating reimbursement claims made by the class members, all of which this Court held had been wrongly denied; and (iii) provide class counsel with periodic status reports regarding the status of these actions. As explained further below and in the attached Declaration of Alessandra M. Venuti (“Venuti Decl.”), these status reports (and class counsel’s investigation as fiduciaries of the class) have revealed that, perhaps despite its best efforts, VA is unable to timely and accurately comply with the Court’s Order. ***We are now more than a year out from the Court’s decision in this case, and, at most, only 2.3 percent of the class members’ claims have been re-adjudicated.*** Accordingly, Petitioners respectfully move the Court to appoint a special master to oversee the enforcement of this

Court's September 9, 2019 and April 6, 2020 Orders so that the class members' claims can be resolved correctly and expeditiously, as required by this Court.

BACKGROUND

I. THIS COURT'S ORDERS REQUIRE CORRECTIVE NOTICE AND READJUDICATION OF VETERANS' WRONGLY-DENIED CLAIMS.

The Court's September 9, 2019 Order held that (i) VA must readjudicate the denied reimbursement claims of the *Wolfe* class members, this time under the proper interpretation of 38 U.S.C. § 1725 and (ii) VA must provide corrective notice to class members who had received inaccurate information concerning what costs of non-VA emergency care would be reimbursed. *See Wolfe v. Wilkie*, 32 Vet.App. 1, 41 (2019).

On March 9, 2020, the Parties filed a Joint Report submitting the terms and means for effectuating corrective notice to class members. The Joint Report contemplated that the 74,432 *Wolfe* class members would receive corrective notice in the form of a "Template 2 Letter." *See Venuti Decl.* ¶¶ 2–3. The Template 2 Letter described the Court's decision in this matter, informed the veteran that he or she was a member of the *Wolfe* class, and stated that as a result of the Court's decision, "VA will re-decide your claim(s) and issue a new decision. *There is no need for you to take any action at this point.*" *See id.*, ¶ 7 and Ex. A thereto (emphasis added).

On March 11, 2020, Petitioners filed a Motion for Enforcement of the Court's September 9 Order, based on the VA's refusal to immediately start implementing the readjudication and corrective notice programs ordered by the Court. This Motion was granted in part on April 6, 2020. *See April 6, 2020 Order* at 4. The Court ordered VA to

begin to send notice to class members within seven days (or by April 13, 2020), and required VA to begin readjudicating claims within 45 days of informing the Court of the start of the corrective notice program. *Id.* The April 6, 2020 Order further required VA to serve a status report updating class counsel on the readjudication of the class members' claims every 45 days after beginning readjudication. *Id.*

II. VA PROVIDES STATUS REPORTS TO CLASS COUNSEL CONTAINING INCONSISTENCIES AND INACCURACIES.

On **July 10, 2020**, VA provided class counsel with its first status report, which indicated that VA had taken action on the reimbursement of 1,856 class members (less than 3% of the class), consisting of (i) readjudication of the reimbursement claims of a mere 297 class members and (ii) requesting an Explanation of Benefits (“EOB”) from the veteran claimants in order to readjudicate 1,559 claims. Venuti Decl. ¶ 9. Class counsel asked for an explanation as to why VA needed to request an EOB in these 1,559 cases, but did not receive an answer until September 3, 2020 at a telephone conference between class counsel and the Office of the General Counsel of VA. *Id.* ¶¶ 10–11. VA explained that when it previously denied reimbursement to 74,432 class members due to deductibles and/or coinsurance, VA adjudicators did not review the claims file and therefore never determined whether the file contained an EOB. *Id.* ¶ 11. To re-decide these prior denials, VA adjudicators actually reviewed the claims files in those 1,559 cases and found that VA had not previously received an EOB. *Id.* ¶¶ 10-12, 19-20. Accordingly, those class members (and presumptively, many more) would have to provide an EOB in order for VA to readjudicate their claims. *Id.*

Class counsel then spoke to six of the 297 veterans whose claims VA listed as having been readjudicated, and none of those six had received any readjudication decision from VA (instead, they only received the Template 2 Letter). *Id.* ¶ 13. VA later explained that they had misclassified these class members and in fact their claims had not been readjudicated. *Id.* ¶ 14. Class counsel does not know how many other class members were misclassified in the July Status Report, or whether *any* class members' claims had actually been readjudicated at that point.

On **August 27, 2020**, VA provided a second status report, in which VA represented that they had made readjudication decisions for 2,037 class members (still less than 3% of the class). *Id.* ¶ 16. Following a survey of 100 randomly-sampled veterans whose claims VA listed as having been readjudicated, class counsel discovered, again, that 10 out of 11 respondents had not received a new decision by VA on their reimbursement claims. *Id.*

The August 2020 status report was lacking specific categories of information that had been included in the July report, including the number of veterans to whom VA had purportedly sent EOB requests. *Id.* ¶ 23. Instead, the August 2020 report created a new category called "Development Initiated," which VA cryptically explained meant that the VA "has started processing" the claim. *Id.* ¶¶ 22, 20, n.5. The August 2020 report was also completely missing 12 class members who had previously been categorized "EOB Requested." *Id.* ¶ 25.

On **October 13, 2020**, VA provided class counsel with the next status report. This report represented that VA had finally readjudicated three of the four class members who were "misclassified" in the July report, but class counsel's investigation revealed that none

of those class members had, in fact, received a new decision on their reimbursement claim. *Id.* ¶¶ 14, 25. Furthermore, the October 2020 status report revealed many inconsistencies from the prior reports, including the complete omission of dozens of class members that had been listed in previous status reports. *See id.* ¶ 25. Even assuming the October status report is accurate, at most 1,711 veterans have had all claims readjudicated, which is only 2.3% of the class, despite over a year passing since the Court’s September 9, 2019 decision. *See id.* ¶ 24.

ARGUMENT

I. VA HAS NOT TIMELY COMPLIED WITH THE COURT’S ORDER.

A. After Representing to this Court, Class Counsel, and Class Members That It Needed No Additional Information to Adjudicate the Class Members’ Claims, VA is Now Asking for Additional Information From Thousands of Class Members.

The Parties’ Joint Report required VA to send notice to the class members in the form of agreed-upon template letters. *See generally*, March 9, 2020 Joint Report. The Court’s April 6, 2020 Order then required that such letters be sent out to class members beginning no later than April 13, 2020. *See* April 6, 2020 Order at 4. Critical to this Motion, the Template 2 Letter told class members that they need not take any action for their claims to be readjudicated; however, VA later determined it would need to seek EOBs from those class members in order to process the claims. Venuti Decl. ¶¶ 9–12. Evidently, as class counsel learned only in September, this is because the VHA adjudicators had not reviewed the file regarding those class members’ claims when they previously denied the claims due to deductibles and/or coinsurance, and therefore never determined whether the file in fact

contained an EOB. *Id.* ¶ 11. At the time VA submitted the Joint Report to this Court, VA clearly had not conducted an accurate or complete investigation of class members' claims (apparently assuming that all of the files already contained an EOB), setting the parties and VA on a course that would make timely, accurate, and complete compliance by VA nearly impossible.¹

B. More Than a Year After this Court Found That the Class's Reimbursement Claims Were Wrongly Denied, The VA Has Made Little Progress in Readjudication.

The Court's April 6, 2020 Order unambiguously required VA to begin readjudicating class members' claims by no later than May 28, 2020. *See* April 6, 2020 Order at 4. However, it is clear from status reports to class counsel that there has been little, if any, progress in the readjudication of class members' claims. Based on class counsel's investigation to date, class members who VA represented as having received readjudication decisions did not actually receive any communications from the VA other than the Template 2 Letter. *See id.* ¶¶ 13, 15. VA's July and August status reports significantly misstated the identity and number of the class members whose reimbursement claims VA had readjudicated, evidencing VA's failure to comply with the Court's Orders to date.

¹ VA's conduct prior to the March 9, 2020 Joint Report has harmed class members and cast a pall over the readjudication process. If, during the period from 2016 to 2019, VA had observed fundamental principles of administrative law requiring review of the administrative record prior to issuing 74,432 wrongful denials, VA would possess the needed EOBs; that is, VA would have long ago realized that the needed EOBs were missing in most cases and taken action to obtain them. Alternatively, if VA had conducted an adequate investigation prior to the March 2020 Joint Report, it would have then realized that the EOBs were missing and taken steps to obtain them. VA did neither.

In order to ensure compliance with the Court's Orders and timely readjudication of reimbursement claims wrongly denied, the Court's April 6, 2020 Order required VA to serve status reports on class counsel every 45 days on the progress of readjudication of class members' claims. *See* April 6, 2020 Order at 4. However, these reports, including the most recent October 2020 report, have included inaccuracies and inconsistencies, making it impossible for class counsel to assess VA's progress on readjudication. *See* Venuti Decl. ¶¶ 13–25. VA's failure to provide accurate and consistent status reports violates this Court's Orders. Moreover, even at best, VA appears—more than a year after the *Wolfe* decision—to have only adjudicated 2.3 percent of the class members' claims. *Id.* ¶ 24.

II. THE COURT SHOULD APPOINT A SPECIAL MASTER TO MONITOR VA'S COMPLIANCE WITH THIS COURT'S ORDERS AND ENSURE TIMELY READJUDICATION OF VETERANS' WRONGLY-DECIDED CLAIMS.

VA has had ample time to remedy its deficiencies and has failed to correct them despite multiple attempts by class counsel and this Court to enforce the Orders. Ensuring accurate and prompt compliance is critical to enforcing VA's substantive compliance with the Orders and to ensuring that the class members obtain the relief that they have been seeking (and to which this Court has determined they are entitled) for many years. VA has been unable to provide reliable explanations for the inaccuracies in its reports. VA has only readjudicated at most 2.3 percent of class members' claims at this point, over a year after the September 9, 2019 decision. The most effective way to deal with this is to appoint a special master to oversee VA's compliance and provide practical guidance for resolving the class members' claims in a timely and effective manner.

This Court has the power to appoint a special master under its broad inherent and equitable powers. *See e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 72 F.3d 857, 864 (Fed. Cir. 1995), *vacated on other grounds*, 117 F.3d 1385 (Fed. Cir. 1997) (“[t]he federal courts have certain inherent powers to appoint persons unconnected with the court to aid judges in the performance of specific duties”); *see also* Fed. R. Civ. P. 53(a)(1)(C) (allowing appointment of special masters under a variety of circumstances, including to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”). A special master is proper here because the issues here are purely ministerial; the special master would not be interpreting the law or engaging in judicial decision-making, and instead would be used for purely enforcement purposes. *See, e.g., United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) (“The power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established”); *In re U.S.*, 185 F.3d 879, 1998 WL 968487, at *2 (Fed. Cir. 1998) (unpublished) (denying petition for writ of mandamus seeking to overturn the Court of Federal Claims’ appointment of a special master for management and administrative purposes).

Monitoring of this kind is especially appropriate in cases like this, where the Petitioners are requesting (and the Court has ordered) systemic reform of agency practices and where there are repeated and prolonged failures to comply with Court Orders. *See, e.g., Salazar v. District of Columbia*, No. CA-93-452(GK), 1997 WL 306876, at *1–2 (D.D.C. Jan. 17, 1997) (appointing special master where enforcement of court order will be “a complex and time-consuming task” requiring “on-going monitoring” and “analysis of

complex reports and studies”); *N.Y. State Ass’n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 962–63 (2d Cir. 1983) (“[t]he monitoring of a Consent Judgment that mandates individualized care for thousands of class members and that entails balancing of the interests of parties [with third-party groups] is just the sort of polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process”) (quotations and citations omitted); *Nat’l Org. For the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542–44 (9th Cir. 1987) (appointment of special master was appropriate given that state and federal entities were not complying with a preliminary injunction issued nearly a year earlier).

The special master should be empowered to ensure that VA is complying with the policies and procedures outlined in this Court’s Order, and, more specifically, to assess the progress of VA’s readjudication of claims. For example, courts have found monitors appropriate to:

. . . monitor implementation and compliance, to convene a meeting of the parties, establish a reporting structure that enables the monitor to effectively assess the progress of the implementation of the . . . Consent Decree, obtain information from [defendants], issue compliance reports, attempt to resolve disputes, and review requests by either party for modification . . . , and if necessary, to make a recommendation to the Trial Judge regarding the request for modification.

Juan F. v. Weicker, 37 F.3d 874, 880 (2d Cir. 1994) (internal quotation marks omitted).

Petitioners therefore request that a special master be appointed and given authority to accomplish important tasks, including (a) preparing a report for the court and the Parties that gives an accurate and complete picture of the current status of readjudications and notice requirements; (b) evaluating and providing feedback on VA’s procedures in place

for readjudication of these claims in a reasonable and timely manner; (c) receiving and evaluating reports from VA on the status of the class members' claims; and (d) continuing to monitor VA's efforts to come into compliance with this Court's Orders. Petitioners request that the appointment last for the duration of the time required for all class members' claims to be readjudicated.

CONCLUSION

Petitioners have no doubt that VA has been attempting to comply with this Court's Orders, but VA has shown itself unable to do so, hurting the class members who are entitled to a meaningful and timely remedy. The appointment of a practical and impartial special master to oversee VA's compliance with this Court's Orders will be beneficial to everyone in this case. Accordingly, Petitioners respectfully request that the Court grant this Motion.

Respectfully submitted,

Date: October 27, 2020

/s/ Mark B. Blocker

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